Nos. 368, 369, 370

In the Supreme Court of the United States

OCTOBER TERM, 1944

GEMSCO, INC., ET AL., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

MILDRED MARETZO, ET AL., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

JOSEPHINE GUISEPPI, ET AL., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT

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OPINIONS BELOW

The principal opinion below (R. 211–241) was written by Judge Frank. Judge Learned Hand delivered a concurring opinion (R. 241–243). Judge Swan delivered a dissenting opinion (R. 243–246). These opinions have not yet been reported.

JURISDICTION

The judgments of the circuit court of appeals were entered July 27, 1944 (R. 246–248). The petition for certiorari was filed August 18, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 10 (a) of the Fair Labor Standards Act.

QUESTIONS PRESENTED

1. Whether the Fair Labor Standards Act authorizes the Administrator to include in a minimum wage order a term or condition prohibiting employers from distributing industrial homework to homework employees, upon finding pursuant to Section 8 (f) of the Act that the prohibition is necessary to carry out the purpose of such order, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.

2. Whether Section 8 (f) involves an unconstitutional delegation of legislative power.

3. Whether the prohibition of industrial homework violates the Fifth Amendment.

STATUTE INVOLVED

Section 6 of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201 *et. seq.*, establishes basic minimum wages to be paid each employee engaged in interstate commerce or in the production of goods for interstate commerce—prior to October 24, 1939, the minimum was 25 cents an hour; from then until October 24, 1945, it is 30 cents an hour; and thereafter (subject to a few exceptions) it will be 40 cents an hour.

Section 8 of the Act, however, looks to the more rapid establishment of the 40-cent minimum by the issuance of administrative wage orders, based on the recommendations of industry committees, fixing "the highest minimum wage rates for the industry which * * * will not substantially curtail employment in the industry" (Section 8 (b)). Section 8 (f) requires the Administrator to include in such wage orders the terms necessary to make them effective:

> Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.

STATEMENT

The Wage Order for the Embroideries Industry was issued in accordance with the statutory procedures outlined in Section 8. The industry committee unanimously recommended the establishment of a minimum wage rate of 40 cents an hour for all employees in the Embroideries Industry (R. 41). After proper notice, the Administrator held a hearing upon the recommendation (R. 41–42) and approved it (R. 36).

At the time he was considering the industry committee's recommendation, the Administrator was required by Section 8 (f) of the Act to determine also what incidental terms and conditions he should include in any wage order that he might issue establishing a 40 cent minimum wage for the industry. Especially, it was necessary to consider the problem of industrial homework,[1] which the Administrator had previously found it necessary to prohibit in six other industries in order to

[1] Industrial homework means manufacture in the home. In the Embroideries Industry, which is here involved, as in other industries, the materials worked upon are furnished by the employer, the work is done at home, and the completed product is returned to the employer. The homeworker is to be distinguished from the small entrepreneur who sells his own handiwork. The homeworker simply sells his labor. He is an industrial wage earner like the factory employee. In the Embroideries Industry, precisely the same operations performed by some workers at home are also performed by others in the factories or work shops of their employers (R. 167).

make his wage orders effective.[2] Consequently, although no hearing was required upon this issue, the Administrator broadened the scope of the hearing on the industry committee's recommendation so that it would cover the question whether the distribution of industrial homework should be restricted or prohibited in order to prevent evasion and safeguard the 40 cent minimum wage rate (R. 42).

The Administrator made an exhaustive study of the evidence introduced in order to ascertain the effect of homework upon the establishment of a 40 cent minimum wage rate in the Embroideries Industry. His subsidiary findings of fact (R. 64–169) were summarized by the court below and, in order to avoid repetition, we respectfully refer this Court to that statement (R. 213–218).

The Administrator made two ultimate findings of decisive importance in the present case. He concluded that a prohibition of homework in the Embroideries Industry was necessary to safeguard the 40 cent minimum wage (R. 136–137)—

> that it is necessary, in order to carry out the purposes of the minimum wage order for the Embroideries Industry, to prevent

[2] Jewelry Manufacturing Industry, 8 Fed. Reg. 6097; Knitted Outerwear Industry, 7 Fed. Reg. 2592; Women's Apparel Industry, 7 Fed. Reg. 5589; Gloves and Mittens Industry, 7 Fed. Reg. 6713; Button and Buckle Manufacturing Industry, 7 Fed. Reg. 7586; Handkerchief Manufacturing Industry, 8 Fed. Reg. 1187; Embroideries Industry, 8 Fed. Reg. 12126.

> the circumvention or evasion thereof, and to safeguard the [40-cent] minimum wage rate prescribed therein, to include terms and conditions in the order which shall provide that no work in the Embroideries Industry shall be done in or about a home, apartment, tenement, or room in a residential establishment * * * [except in certain specified extraordinary cases].

He also concluded that the practice had no more than incidental importance and that the prohibition would not cause substantial difficulties in the industry (R. 149, 166, 167)—

> I have considered all the evidence relating to adjustment to the factory system of manufacture and find that this adjustment can reasonably be made without undue hardship upon home workers or home work employers.
>
> * * * * *
>
> I have already found that prohibition of home work will not involve any substantial difficulties in the Industry.
>
> * * * * *
>
> Prohibition of home work will not prohibit any type of work or occupation but will merely compel the transfer of work and occupations formerly carried on in the homes to the factory where the workers may be adequately supervised and their payment in accordance with the minimum wage order for the Industry guaranteed. The possibilities of adjustment to a prohibition of home work which are disclosed by the

record furnish ample assurance that no substantial curtailment of operation will result. All of the operations in question are performed in the factory as well as in the home.

Thereupon the Administrator approved the 40-cent minimum wage recommended by the industry committee and issued the wage order under review.

After promulgation of the wage order, petitioners filed petitions for review of the order in the circuit court of appeals, pursuant to Section 10 of the Act, challenging the power of the Administrator to include in the order the terms prohibiting home work. Petitioners conceded that such provisions were necessary to prevent evasion of the wage order and to safeguard the wage rates established but denied that there was power to deal with the evil. The circuit court of appeals sustained the wage order and dismissed the petitions for review (R. 246–248).

DISCUSSION

1. Because of the importance of the questions involved we do not oppose the granting of certiorari. We state below, however, our reasons for believing that the decision of the circuit court of appeals is right, and we suggest, for reasons also stated hereinafter, that if certiorari is granted the case be advanced for argument.

2. The purpose of the Wage Order for the Embroideries Industry is to raise, in accordance with

Section 8 of the Act, the minimum wage paid by the industry "to the highest minimum wage rates [not in excess of 40 cents an hour] * * * which * * *, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry" (Section 8 (b)). The prohibition of homework is directed exclusively to safeguarding the minimum wage. The Administrator emphasized in his findings that he had confined himself to the question of the effect of homework on the minimum wage rate and had not taken into account its other social and economic evils (R. 81). As Judge Frank pointed out, "This is not a case, then, where an effort is being made to utilize § 8 (f) as a subterfuge to achieve an independent end outside the scope of the Act" (R. 219–220).

The Administrator's ultimate finding that the prohibition of homework is necessary to prevent evasion of the wage order is amply supported by the evidence adduced at the hearing, although it seems plain under the decision in *Pacific States Co.* v. *White*, 296 U. S. 176, that neither hearing nor evidence was required. Cf. *Steuart & Bro., Inc.* v. *Bowles*, No. 793, last Term, decided May 22, 1944. Petitioners, indeed, do not contest the correctness of the finding; moreover, by not bringing the evidence to the court below, they waived any contention that the finding lacks an adequate basis. *Railroad Comm.* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 392, 398, 401.

All that Section 8 (f) requires as a prerequisite to the inclusion of a term or condition in a wage order is that the Administrator shall make a valid finding that it is "necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein." Here the Administrator made such a finding and its validity is clear. It follows, we submit, that the term prohibiting homework was properly included in the wage order under review.

In making this contention we assume of course that Section 8 (f) implicitly limits to those that are truly incidental the terms and conditions to be included in a wage order. Congress could not catalog all the devices or practices that would circumvent the purposes of a wage order. Neither could Congress answer the detailed questions of degree involved in determining in each situation what enforcement measures would be appropriate incidents to the wage rate established. Congress met these difficulties by leaving the adaptation of means to end to the process of administration. For these reasons Section 8 (f) places no limitation on the kind of terms or conditions to be inserted, or on the subjects that they may touch, but delegates to the Administrator the task of determining what terms and conditions should be included to prevent the order's frustration. The relation of means to end was confided

to the Administrator's sense of proportion. When the Administrator makes a reasonable choice under the circumstances, his decision is final. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194; *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218; *Morgan Stanley & Co.* v. *Securities Exchange Comm.*, 126 F. (2d) 325, 332 (C. C. A. 2); cf. *Gray* v. *Powell*, 314 U. S. 402.

The legislative history of the Act demonstrates that Congress knew that the phrase "such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders * * *" was broad enough to include a term or condition prohibiting industrial homework. The Black-Connery Bill, when it passed the Senate, provided that the Administrative wage orders—

> shall contain such terms and conditions (including the restriction or prohibition of industrial home work or of such other acts or practices) as the Board finds necessary * * *.

The illustrative parenthetical phrase without the reference to homework—i. e., "(including the restriction or prohibition of such acts or practices)"—had been inserted in committee (S. Rept. 884, 75th Cong., 1st sess.). The express reference to industrial homework was inserted on the floor (81 Cong. Rec. 7891). Obviously, the Senate regarded provisions restricting or prohibiting indus-

trial homework as among the terms and conditions which the Administrator might find it necessary to include in a wage order in order to safeguard the minimum wage.

The House Committee on Labor approved the provision in the form in which it passed the Senate. It was included in the first bill reported and considered on the floor of the House.[3] Even after the bill was recommitted to the Committee on Labor the same language was retained through many revisions.[4] Finally, in the Confidential Subcommittee Print "A" of February 18, 1938, a change was made which added still further examples of "such terms and conditions;" as modified the provision read:

> (3) shall contain such terms and conditions (including the restriction or prohibition of industrial home work or such other acts or practices and such requirements as the keeping of records, labeling, periodic reporting and posting of orders and schedules) as are deemed necessary to carry out the purpose of such order and prevent the circumvention or evasion thereof, or to safeguard the standards therein established.

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[3] Section 9 (6), House Committee Print of August 5, 1937; Section 9 (6), as reported August 6, 1937, in H. Rept. 1452, 75th Cong., 1st sess.

[4] Section 9 (6), House Confidential Committee Prints of December 7, 1937, December 14, 1937, and December 17, 1937.

Contrary to the representation implicit in petitioners' brief (pp. 7, 14), the House never specifically rejected the parenthetical clause referring to home work. What happened was this: Shortly before passage, the entire scheme of the House bill was changed. The Senate bill and the first bills reported by the House Committee on Labor had proposed to create a Board having the power to issue administrative orders establishing minimum wage standards. The House Committee on Labor abandoned that plan after several defeats in the House, and reported a bill which would fix specific statutory minimums and contained no provision for administrative orders. S. 2475 as reported by Committee on Labor, H. Rept. 2182, 75th Cong., 3d sess. This bill, of course, also omitted the provision made in the Senate bill for including in administrative orders any necessary incidental provisions. After debate the House approved this bill. 83 Cong. Rec. 7450.[5]

[5] While this draft of bill was being debated in the House, Congressman Ramspeck offered a substitute which adopted the theory of the Senate bill and the earlier House Committee proposals and which therefore included the same provision for incidental terms and conditions which had been in the Senate bill (83 Cong. Rec. 7373–7378). This is the amendment referred to on pages 7 and 14 of the petitioners' brief. The entire substitute was rejected by the Committee and by the House. The clause dealing with home work was a small and comparatively unimportant provision in the substitute bill. It was never separately considered. Obviously, the defeat of the substitute is not the slightest evidence that the House determined to withhold from the Administrator the power to prohibit home work even if the prohibition be necessary

In conference, a compromise was worked out between the Senate plan for administrative regulation of wages and the House proposal for fixed statutory minimums. The Conference bill proposed the fixed statutory standards which are set forth in Section 6 of the Act, but supplemented them with the administrative procedure, now found in Section 8, for raising the minimum rate up to 40 cents an hour by the issuance of administrative wage orders. The Conference bill included *in haec verba* the provisions which are now Section 8 (f).

Neither the Conference Report (H. Rept. 2738, 75th Cong., 3d sess.) nor the ensuing debate reveals the reason for omitting from Section 8 (f) the parenthetical illustrations that the Senate had approved unanimously and the House Committee on Labor had accepted repeatedly as appropriate if any provisions for wage orders was made in the bill. Petitioners' argument that the deletion shows a desire to limit the power of the Administrator proves too much. At various times the parenthesis spoke of "industrial homework," "other acts or practices," "the keeping of records, labeling, periodic reporting," and the "posting of orders and schedules." Surely, it will be conceded that the Conference Committee did not signify by deleting all these illustrations that the

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to the establishment of a fair minimum wage. For this reason the cases cited by petitioners as inconsistent with the decision below entirely miss the mark.

Administrator was to have no power to include any terms or conditions dealing with any evasive "acts or practices," or with record keeping, or reports, or labeling, or posting copies of orders and wage schedules. Yet all the illustrations were deleted without comment and there is no basis for assuming that the Conference Committee intended the deletion of some to work a substantive change and the deletion of others to have no significance. The true explanation of the omission must be that the draughtsman sought to clarify Section 8 (f) by omitting illustrations which had become so cumbersome that there was danger that they might cloud the essentially simple purpose of the section. Cf. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 188–189, 211. The significant point in this legislative history, therefore, is not the deletion but is the clear demonstration in the earlier bills that Congress knew that industrial homework was one kind of evasive act or practice that the language of Section 8 (f) was broad enough to cover.

Petitioners lay great stress on the absence of any provision in the Act which would enable the Administrator to prohibit homework in order to prevent evasion of the statutory minimum wage rates as distinguished from the rates established by wage order (Br. 17–18). They emphasize the contrast by pointing out that the power of the Administrator to issue wage orders will terminate for all practical purposes only thirteen months

hence, on October 23, 1945, when, they contend, they will be free to resume the practice of distributing industrial homework. One complete answer is given in the opinion of Judge Learned Hand (R. 241–243): Section 8 (f) should be read as granting power to issue orders containing terms or conditions necessary to prevent evasion of the statutory wage rates. Contrary to petitioners' statement (Br. p. 18), Judge Frank did not disagree with this interpretation.[6]

A second answer is given in Judge Frank's opinion (R. 222–224). Lack of power to prohibit home work to protect the statutory wage rates would not prove that there is no power so to protect the rates fixed by wage order. Under Section 8 (f) all evasive acts and practices stand on the same footing, and the absence from Section 6 of an analogue, expressly authorizing the Administrator to regulate practices evasive of the statutory rates, surely does not show that Congress intended Section 8 (f) to be wholly nugatory. The Act was a compromise between conflicting proposals. It would not be surprising, therefore, to find that a power given to the Administrator in connection with his authority to issue administrative wage orders was not conferred in those parts of the bill which were drawn from a proposal to fix rigid statutory rates without administrative ac-

[6] See R. 222–223, where Judge Frank stated that in his view the question of the power of the Administrator to safeguard the statutory wage rates "is an issue not now before us."

tion. "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive." See *Addison* v. *Holly Hill Fruit Products, Inc.*, No. 217, last Term, decided June 5, 1944, slip sheet, p. 8. Neither is the existence of a possible defect or the absence of perfect symmetry sufficient reason for narrowing a statute by restricting a power that the words have plainly granted.

Judge Learned Hand expressed the opinion that this reading of the statute ascribed to Congress absurdity of purpose because the consequences of the prohibition of homework would be felt long after the industry would be free to resume it. But his opinion on this point, we believe, exaggerates the injury to the industry, in disregard of the Administrator's findings, and minimizes the good to be achieved by the prohibition of homework for even a year. The Administrator found that the prohibition of homework in the Embroideries Industry "will not prohibit any type of work or occupation but will merely compel the transfer of work and occupations formerly carried on in the homes to the factory" (R. 167), "will not involve any substantial difficulties in the Industry" (R. 166), and "can reasonably be made without undue hardship upon home workers or home work-

employers" (R. 149). Moreover, experience gives reason to believe that the practice of distributing industrial homework, once abolished, will not be resumed, because of the advantages to the employer of supervised production (R. 149–153, 164–165). Hence, enforcement of the prohibition now is not only necessary to prevent evasion of the 40-cent minimum wage established by the wage order but it may in fact go far to forestall evasion of the statutory minimums in the future.

Section 8 (f), moreover, should not be read as if it had been enacted to cover only the thirteen month period for which this wage order will be effective. In 1938 when the Act became effective, wage orders had seven years to run. Orders covering other industries which contain prohibitions of homework have been in force for several years. Surely it was not unreasonable for Congress to confer authority upon the Administrator to prevent evasion of wage orders for a seven year period, even though it may not have dealt with the danger of evasion of the fixed statutory rates in the more distant future.

Petitioners also attack Section 8 (f) and the prohibition of homework on constitutional grounds. These arguments, however, are answered fully in the opinion of Judge Frank (R. 224–241) and require no additional discussion.

3. In the event that writs of certiorari are granted, we respectfully suggest that the cases be advanced for argument.

221–224). These opinions are reported in 144 F. (2d) 608.

JURISDICTION

The judgments of the circuit court of appeals were entered on July 27, 1944 (R. 224–226). The petition for a writ of certiorari was filed on August 18, 1944 and granted on October 16, 1944 (R. 231–232). The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 10 (a) of the Fair Labor Standards Act.

QUESTION PRESENTED

Whether the Fair Labor Standards Act authorizes the Administrator to include a term or condition prohibiting industrial homework in a minimum wage order upon finding, pursuant to Section 8 (f) of the Act, that the prohibition is necessary to carry out the purposes of such order, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rate established therein.

STATUTE INVOLVED

Section 6 of the Fair Labor Standards Act[2] establishes basic minimum wages to be paid each

[2] Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. 201 *et seq.* For the convenience of the Court a complete copy of the Act is set forth as an Appendix, *infra*, p. 80.

employee engaged in interstate commerce or in the production of goods for interstate commerce. Prior to October 24, 1939, the minimum was 25 cents an hour; from then until October 24, 1945, it was, is, and will be 30 cents an hour; thereafter it will be 40 cents an hour.

Section 8 of the Act looks to the more rapid establishment of the 40-cent minimum by the issuance of wage orders applicable to particular industries fixing "the highest minimum wage rates for the industry which * * * will not substantially curtail employment in the industry" (Section 8 (b)). Section 6 provides that any rate so fixed shall become the minimum wage to be paid to every employee covered by the Act and the order.

Section 8 also prescribes both the procedure to be followed in promulgating a wage order and the terms which the order may contain. The Administrator is to summon an industry committee consisting of equal numbers of public, employer and employee representatives (Sections 5 (a), 5 (b), 5 (c), 8 (a)). The Committee is to make an investigation and recommend "the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry" (Sections 8 (b), 8 (c)). Upon receiving the report of the industry commit-

tee, the Administrator is to give interested persons notice and an opportunity to be heard, and thereafter he is to determine whether the recommendations are in accordance with law, supported by the evidence, and adapted to carrying out the purposes of the Act. If the Administrator disapproves the report, he refers the matter back to the industry committee. If he approves the report, he "shall by order approve and carry into effect the recommendations". (Section 8 (d).)

Section 8 (f) requires the Administrator to include in such wage orders the terms necessary to make them effective. It provides:

> Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.

STATEMENT

I. ADMINISTRATIVE PROCEEDINGS LEADING TO THE PROMULGATION OF THE WAGE ORDER FOR THE EMBROIDERIES INDUSTRY

The wage order for the embroideries industry was issued in accordance with the statutory procedures outlined above. The industry committee unanimously recommended the establishment of a

minimum wage rate of 40 cents an hour for all employees in the embroideries industry. (R. 38–39.) A notice of hearing, published in the Federal Register on September 16, 1942, stated that evidence would be received on the question whether the recommendations of Industry Committee No. 45 should be approved or disapproved (R. 39).

While considering the industry committee's recommendation, the Administrator was required by Section 8 (f) of the Act to determine also what terms and conditions he should include if he issued a wage order establishing the 40-cent minimum wage rate for the industry. Especially, it was necessary to consider the problem of industrial home work, which the Administrator had previously found it necessary to prohibit in six other industries in order to make wage orders effective.[3] Consequently, although the Act does not require a hearing on this issue, the Administrator broadened the scope of the hearing on the industry committee's recommendation so that it would cover the question whether the distribution of industrial home work should be restricted or pro-

[3] Jewelry Manufacturing Industry, 8 Fed. Reg. 6097; Knitted Outerwear Industry, 7 Fed. Reg. 2592; Women's Apparel Industry, 7 Fed. Reg. 5589; Gloves and Mittens Industry, 7 Fed. Reg. 6713; Button and Buckle Manufacturing Industry, 7 Fed. Reg. 7586; Handkerchief Manufacturing Industry, 8 Fed. Reg. 1187.

hibited in order to prevent evasion of, and safeguard, the 40 cent minimum wage rate (R. 39).

The public hearing consumed 10 full days and two evening sessions. All interested parties were given an opportunity to be heard. Extensive testimony and many exhibits were received in evidence. (R. 39–40.) Thereafter, the Administrator made his findings of fact based on the evidence adduced at the hearing (R. 42–155) and issued the wage order under review (R. 34–39; 8 Fed. Reg. 12126).

II. THE WAGE ORDER FOR THE EMBROIDERIES INDUSTRY

The chief term of the wage order for the embroideries industry is a provision establishing the rate of 40 cents an hour as the minimum wage to be paid under Section 6 to employees in the industry engaged in interstate commerce or in production of goods for interstate commerce. The order contains a definition of the embroideries industry and also requires the posting of certain notices (R. 36–37). None of these provisions is challenged in the present case.

In addition, the wage order provides (R. 36)—

> No work in the Embroideries Industry, as defined herein, shall be done in or about a home, apartment, tenement, or room in a residential establishment after November

15, 1943,[4] except by such persons as have obtained special home work certificates issued pursuant to applicable regulations of the Wage and Hour Division, authorizing industrial home work by a worker who—

(1) (a) Is unable to adjust to factory work because of age or physical or mental disability; or

(b) Is unable to leave home because his presence is required to care for an invalid in the home; *and*

(2) (a) Was engaged in industrial home work in the Industry, as defined, prior to November 2, 1942 (except that if this requirement shall result in unusual hardship to the individual home worker it shall not be applied); or

(b) Is at any time engaged in such industrial home work under the supervision of a State Vocational Rehabilitation Agency or of a Sheltered Work Shop, as defined in § 525.1, Part 525, Chapter V, Title 29, Code of Federal Regulations.

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[4] On November 6, 1943, the date was postponed to March 31, 1944. See 8 Fed. Reg. 15362. Subsequently, the effective date was postponed to May 15, 1944 (see 9 Fed. Reg. 2669), again to June 26, 1944 (see 9 Fed. Reg. 4952), and finally to July 26, 1944 (see 9 Fed. Reg. 7095). The prohibition is now in effect but since the circuit court of appeals stayed its enforcement until this Court should act on the petition for certiorari, the Administrator will take no enforcement action until this Court hands down its opinion.

This prohibition of homework does not prohibit any type of work or occupation but will merely compel the transfer of such work as is now done in the employees' homes from there to the factories or work shops of their employers (R. 152). And the provision for special certificates will avoid imposing hardship upon persons unable to adjust themselves to factory work (R. 153).

III. THE ADMINISTRATOR'S FINDINGS ON THE EFFECT OF INDUSTRIAL HOME WORK

Industrial homework means manufacture in the home. In the embroideries industry, here involved, as in other industries, the materials worked upon are furnished by the employer, the work is done at home, and the completed product is returned to the employer. The homeworker is to be distinguished from the small entrepreneur who sells his own handiwork. The homeworker sells only his labor. He is an industrial wage earner just as is the factory employee.[5] In the embroideries industry, precisely the same operations performed by some workers at home are also performed by others in the factories or work shops of their employers (R. 153).

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[5] O. W. Rosenzweig, *N. R. A. and Industrial Home Work*, Work Materials No. 45, The Labor Program under the N. I. R. A., Office of National Recovery Administrator, Division of Review, Labor Studies Section (March 1936), pp. 6–7.

In *United States* v. *Rosenwasser*, No. 106, this Term, the question raised is whether a piece rate worker is an employee within the meaning of the Act Petitioners do not contend that the homeworkers here involved are not employees.

In the instant case, the Administrator made an exhaustive study of the effect of homework on the establishment of a 40 cent minimum wage for the embroideries industry and of the effect of any prohibition of homework upon both employees and employers. His findings may be summarized as follows:

A. *Extent to which home work is practiced in the embroideries industry.*—Homework in the embroideries industry is distributed to the workers directly by regular embroidery manufacturers or contractors who have their own shops, and indirectly through contract shops or distributors (R. 80–81). The number of homework employees per firm varies greatly; in New York the average per firm is 26 workers; in Pennsylvania, the average is nine (R. 80). In the years immediately prior to the administrative hearing, the practice of distributing embroidery work among homes was widespread in the industry. In June 1942, there were 18,500 factory workers. The number of employees working at home, which cannot be ascertained precisely, ranged upwards from 8,500—35 per cent of the total. Some 70 per cent of the homeworkers were employed by New York firms; 17 per cent by employers in New Jersey, and the rest were scattered throughout other States. (R. 79.) The proportion of home work employees to all employees, however, has not always been so high; for example, N. R. A. codes for four

branches of the industry prohibited homework and thus concentrated a greater proportion of the work in the work shops or factories (R. 109–110).

B. *The effect of home work on minimum wage standards in the embroideries industry.*—Experience under the Fair Labor Standards Act and under an earlier wage order issued pursuant to it, has demonstrated that the practice of distributing work to employees in their homes results in "wholesale violation of the record-keeping and minimum wage requirements of the Act and regulations" and furnishes "a ready means of circumventing or evading the minimum wage order" (R. 117). This was established by inspections made of 222 firms in the industry during the period between May 1, 1941 and May 1, 1942. Only three per cent of the firms were found to be in compliance. (R. 98.) Ninety-five per cent of the employers had not kept records at all or had kept inadequate or inaccurate records. Even though special record keeping regulations had been issued providing for the use of handbooks in which employees could record their hours of work and earnings, 46 percent of the employers had not used handbooks. Many others had failed to keep proper records of home workers' hours of work, a basic requisite in determining compliance. In addition, there was evidence that records were being falsified; this was done, for example, by recording as hours

worked not the actual number but a fictitious figure determined by dividing the weekly earnings by the prevailing minimum wage. (R. 98–99.)

Violations of the minimum wage rates fixed in the prior order (as distinguished from record keeping violations) were also widespread (R. 103, 117). A survey conducted by the Economics Branch of the Wage and Hour Division showed that even in the 18 month boom period which the industry enjoyed between January 1941 and July 1942, more than 60 percent of the homeworkers were paid less than 37½ cents an hour in violation of the wage order then applicable (R. 102). Approximately a third of the homeworkers received less than 25 cents an hour—12½ cents below the minimum; one-sixth received less than 20 cents, and in some instances—1.8 per cent of the total—the employers did not pay even 10 cents an hour for the work (R. 102).

A survey by the New York State Department of Labor confirmed these findings of the Wage and Hour Division (R. 103, 107). The violations extended to all branches and operations in the industry (R. 103–108).[6]

[6] The figures cited on p. 4 of petitioners' brief from the Annual Reports of the Wage and Hour Division are in no sense comparable to the minimum wage violations discussed above. The figures in the Reports show the number of establishments found in violation. Thus a large factory might be shown in violation because one employee was misclassified as an executive even though all the rest of the employees, perhaps hundreds in number, were classified and

The apparent impossibility of enforcing a minimum wage among homeworkers is due in large part, of course, to the opportunities for evasion which the practice of employing homeworkers affords to the unscrupulous seeking unfair competitive advantages. The problem also arises, however, from the difficulties inherent in the varied circumstances under which homework is performed and in the lack of supervision, both of which make it impossible for well-intentioned employers as well as government inspectors to obtain accurate knowledge as to how homeworkers spend their time, under what conditions they work, and what help they secure from other persons. (R. 130.)

For one thing, payment is on a piece-work basis and it is impossible to fix rates for homeworkers which will yield the least skilled worker the minimum without paying the skilled worker an uneconomical wage. The industry is dependent upon novel variations in designs and for each design a new rate must be set. A common practice is to time a sample worker in the factory and to apply the rate thus obtained to the same work when the operation is done in a

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paid in accordance with the Act. This is true in a very great number of cases shown in the Annual Reports. On the other hand, the figures on minimum wage violations in the embroideries industry, stated above, show that more than 60% of the homework employees were not paid the prescribed minimum.

home. Other employers merely fix an arbitrary rate. Inevitably, the actual hourly earnings of the homeworkers vary widely from these standards and among themselves. Homework conditions are not subject to control or standardization as are those in a factory, yet the conditions under which a task is done govern in large part the speed with which it is accomplished and thus affect the hourly earnings of the employee. Moreover, the homeworkers themselves differ greatly in skill, productivity, and efficiency; methods of operation vary among homeworkers, whereas, in a factory, the most efficient techniques can be singled out and taught to all. (R. 117–130.) As a result "piece rates cannot practically be set so as to reflect accurately the hours of work of the home worker or secure reliably a definite hourly wage" (R. 117).

The problem would not be solved by requiring that "make up" be paid to the slower workers because it is virtually impossible to determine their hours of work.[7] The lack of employer supervision, the participation of other persons in picking up and delivering work (which is regarded as work time (R. 115)), the frequent participation of other members of the family in doing the home-

[7] In a number of industries paying wages on a piece-work basis, slow employees are not able to earn the minimum wage at the established piece rates. Since an accurate check can be made of their hours of work, they are paid "make up" in order to meet the statutory requirements.

worker's work, as well as the intermittent character of homework itself, all make it a practical impossibility for either employer or employee to keep an accurate check of the time worked and the wages due to make up the established minimum (R. 122). One homeworker, for example, who believed that she had been paid the applicable minimum and was called by her employer to testify against the proposal to restrict homework, was found to have earned considerably less than the minimum (R. 126–130, compare R. 104–105). Furthermore, fear of loss of employment induces many homeworkers to refrain from reporting time worked in excess of the time which the employer indicates should be required (R. 125).

For these reasons, regulation of homework, even if it included more stringent control of record-keeping practices or governmental establishment of piece rates, would not be adequate to secure effective enforcement of the minimum hourly wage (R. 130).

But the problem is not simply to secure payment of the minimum wage rate for the homeworkers alone. If the 40-cent minimum were not paid to the homeworkers, employers of factory labor would suffer a competitive disadvantage, thereby undermining the wage structure throughout the industry and thwarting the purposes of the order and the Act. Thus, the Administrator found that "The evidence adduced at the hearing con-

clusively shows that large proportions of home work employees in the Embroideries Industry and in all of its branches are paid less than the applicable minimum. It is apparent that if some employers are allowed to utilize home workers at subminimum wage scales, other employers compelled to pay a 40-cent minimum will be placed at a competitive disadvantage." (R. 130–131.)

C. *The possibility of adjustment to factory production.*—Experience in comparable industries has shown that the transfer of work from home to factory can be accomplished without hardship to employees or their employers. After homework was prohibited in the men's neckwear and men's clothing industries by regulations issued under the National Industrial Recovery Act, the Department of Labor conducted a survey which revealed that probably 80 percent of the homeworkers were thereafter employed in factories, and only one firm ceased business. In the men's clothing industry, 94 percent of the homeworkers transferred to factory operation. The homeworkers who shifted to the factory found little trouble in self-adjustment irrespective of age, and output improved in quantity and quality. Hourly earnings increased as much as 200 percent. (R. 137–138.)

Similar experience has been reported in the administration of laws restricting the employment of homeworkers in Rhode Island, New Jersey, and New York (R. 138). In Rhode Island, for ex-

When the decision below was handed down, petitioners moved for an order staying the Administrator from taking any action to enforce the prohibition against homework. The Administrator opposed the stay on the ground that in any event he can take no enforcement action except to file suit for an injunction under Section 17 of the Act. He argued that if he were free to file such suits, he could deal therein, while this Court had the principal matter before it, with all the other legal objections to enforcement that petitioners might raise and thus bring the suits to the point of actual enforcement by final decree. Petitioners, for their part, would not be injured, because when the Section 17 actions reached the point of final decrees supersedeas or stays of enforcement could be granted until the question raised here was decided. This course would prevent dilatory tactics by employers in the industry and ensure prompt enforcement upon a final decision by this Court. Nevertheless, the stay was granted.

In these circumstances it is desirable that the case be heard on the merits at an early date, if certiorari is granted.[7] The wage order will expire on October 23, 1945, and under the view that the prohibition of home work is ancillary to a wage

[7] In addition, it should be pointed out that so long as this case is pending, there will be uncertainty as to the validity of the provisions prohibiting industrial homework in five other wage orders. See p. 5, n. 2, *supra*.

order and not to the statutory minimum, the prohibition cannot be extended thereafter. To advance the case in the interest of an early decision will make it possible to enforce the order against recalcitrant members of the industry if the decision below is affirmed. Timely compliance with the prohibition, enforcement of which is now stayed pending review, would not only check current evasions of the minimum wage but would as a practical matter diminish the likelihood of similar future evasions of the statutory wage after the prohibition of home work has expired but while the stautory minimum remains in force. For experience shows, as we have pointed out, that the distribution of industrial home work, once abandoned, is not likely to be resumed.

CONCLUSION

While we do not oppose the granting of a writ of certiorari, we submit that the decision of the circuit court of appeals is correct.

Respectfully submitted.

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